IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATE FARM FIRE & CAS. CO.	:	**CIVIL ACTION**
	:	
	:	
v.	:	
	:	
MARY ELLEN TOLMIE, THOMAS	:	
JACOBS and ANN JACOBS	:	**NO. 97-7878**

M E M O R A N D U M

WALDMAN, J. **October 21, 1998**

Plaintiff seeks a declaration that it has no duty to defend or indemnify its insured, defendant Mary Ellen Tolmie, in a pending state court tort suit filed against her by Ann and Thomas Jacobs.

The underlying suit arises from an argument at an equestrian school which led to violence when Ms. Jacobs asked Ms. Tolmie to vacate a riding ring while Ms. Jacobs gave a riding lesson. Ms. Jacobs swore out a criminal complaint against Ms. Tolmie and filed the underlying civil lawsuit in the bucks County Common Pleas Court against her for injuries resulting from the fight. Mr. Jacobs sued for loss of consortium.

At all relevant times, Ms. Tolmie was insured under a homeowners policy issued by plaintiff State Farm. State Farm retained counsel for Ms. Tolmie subject to a reservation of rights and commenced the instant declaratory judgment action.

The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a). The citizenship of the parties is diverse and the amount in controversy exceeds $75,000.[1]

Presently before the court is plaintiff State Farm's Motion for Summary Judgment.

The following quote succinctly summarizes an insurer's duty to defend and to indemnify its insured under Pennsylvania law:[2]

> The duty to defend is a distinct obligation separate and apart from the duty to indemnify. Erie Ins. Exchange v. Transamerica Ins. Co., 516 Pa. 574, 582, 533 A.2d 1363, 1368 (1987). The duty to defend arises whenever claims asserted by the injured party potentially come within the coverage of the policy, Gedeon v. State Farm Mutual Automobile Ins. Co., 410 Pa. 55, 56, 188 A.2d 320, 321 (1963), while the duty to indemnify arises only when the insured is determined to be liable for damages within the coverage of the policy. See, e.g., Employers Reinsurance Corp. v. Sarris, 746 F. Supp. 560, 566-68 (E.D. Pa. 1990). It follows then, that when the claims in the underlying action have not been adjudicated, the court entertaining the declaratory judgment action must focus on whether the underlying claims could potentially come within the coverage of the policy. Air Products and Chemicals, Inc. v. Hartford Accident and Indemnity Co., 25 F.3d 177, 179 (3d Cir. 1994). If there is a possibility that any of the underlying claims could be

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[1] The personal liability limit in the subject insurance contract is $100,000. See Britamco Underwriters, Inc. v. Stone, 1992 WL 195378, *2 (E.D. Pa. Aug. 3, 1992)("Where a liability policy is involved in proceedings for a declaratory judgment, the amount in controversy for jurisdictional purposes is the maximum amount for which the insurer could be held liable under the policy").

[2] The parties agree that Pennsylvania law governs the substantive issues in this case.

> covered by the policy at issue, the insurer is obliged to provide a defense at least until such time as those facts are determined, and the claim is narrowed to one patently outside of coverage. C. Raymond Davis & Sons, Inc. v. Liberty Mut. Ins. Co., 467 F. Supp. 17, 19 (E.D. Pa. 1979). On the other hand, if there is no possibility that any of the underlying claims could be covered by the policy at issue, judgment in the insurer's favor with regard to the duty to defend and indemnification is appropriate. See, e.g., Germantown Ins. Co. v. Martin, 407 Pa. Super. 326, 595 A.2d 1172 (1992), alloc. denied, 531 Pa. 646, 612 A.2d 985 (1992).

Britamco Underwriters, Inc. v. Stokes, 881 F. Supp. 196, 198 (E.D. Pa. 1995).

An insurer's duty to defend is determined solely from the allegations in the underlying complaint giving rise to the claim against the insured. Lebanon Coach Co. v. Carolina Cas. Ins. Co., 675 A.2d 279, 286 (Pa. Super. 1996). Determining the duty to defend under an insurance policy is a question of law requiring only an examination of the language of the policy at issue and the allegations in the underlying complaint. Gene's Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246, 246-47 (Pa. 1988). An insurance policy must be read as a whole and be construed according to the plain meaning of its terms. C.H. Heist Caribe Corp. v. American Home Assur. Co., 640 F.2d 479, 481 (3d Cir. 1981); Atlantic Mut. Ins. Co. v. Brotech Corp., 857 F. Supp. 423, 427 (E.D. Pa. 1994) aff'd, 60 F.3d 813 (1995). "Where the language of the contract is clear, a court is required to give the words their ordinary meaning." Id. See also Gene &

Harvey Builders, Inc. v. Pennsylvania Mfrs' Ass'n Ins. Co., 517 A.2d 910, 913 (Pa. 1986) (holding that courts enforce the plain meaning of unambiguous policy language as a matter of law).

The burden is on the insured to establish coverage under an insurance policy. Erie Ins. Exch., 533 A.2d at 1366-67; Benjamin v. Allstate Ins. Co., 511 A.2d 866, 868 (Pa. Super. 1986). The burden of establishing the applicability of an exclusion is on the insurer. Allstate Ins. Co., 834 F. Supp. at 857; Erie Ins. Exch., 533 A.2d at 1366.

The insurance policy at issue provides in pertinent part:

> COVERAGE L - PERSONAL LIABILITY
>
> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a judgment resulting from the occurrence, equals our limit of liability. . . .
>
> SECTION II - EXCLUSIONS
>
> 1. Coverage L and Coverage M do not apply to
>
> a. bodily injury or property damage:
>
> (1) which is either expected or intended by an insured; or

(2) to any person or property which is the result of willful and malicious acts of an insured.

(emphasis in original).

The policy defines "occurrence" as "an accident, including exposure to conditions, which results in: a. bodily injury; or b. property damage."

State Farm argues that the injuries to Mr. and Mrs. Jacobs are not covered because the assault by Ms. Tolmie was not an "occurrence" and because the infliction of injury to Ms. Jacobs was "expected or intended" by Ms. Tolmie.

The Supreme Court of Pennsylvania has construed an equivalently worded definition of "occurrence" to mean "accident." See Gene's Restaurant, 548 A.2d at 247. When it is alleged that the conduct of the insured causing harm was intentional, there has been no accident or "occurrence." See Nationwide Mut. Fire Ins. Co. v. Pipher, 140 F.3d 222, 226 (3d Cir. 1998). The "expected or intended" clause excludes from coverage liability for harm of the type which the insured intends to cause. Id. at 227. An insured intends to cause harm if he desired by his act to do so or if he acted knowing that such harm was substantially certain to result. United Services Automobile Ass'n v. Elitzky, 517 A.2d 982, 989 (Pa. Super. 1986).

Plaintiffs in the underlying suit allege that the insured "violently hit [Ms. Jacobs] in the face with her whip and lead," that the insured "jumped off her horse and started to

violently beat upon [Ms. Jacobs]" and that the insured "used both hands to aggressively grab around [Ms. Jacobs's] neck." Such acts were clearly intentional and of a type substantially certain to cause injury.

The Jacobses also alleges that Ms. Tolmie was "negligent" for failing "to properly ride her horse and control her temper." There is no allegation or suggestion that the injuries sustained by Ms. Jacobs were proximately caused by the manner in which Ms. Tolmie was riding.[3] Assuming that one can "negligently" lose one's temper, it was the physical whipping, strangling and beating which caused Ms. Jacobs's injuries. It is virtually inconceivable that for coverage purposes the state courts would distinguish between an intentional battery accompanied by a display of anger from one inflicted by a cool and composed defendant.

Although factual allegations sufficient to state a prima facie claim for negligence would trigger the duty to defend, "a plaintiff may not dress up a complaint so as to avoid the insurance exclusion." Nationwide Mut. Ins. Co. v. Yaeger, 1994 WL 447405, at *2 (E.D. Pa. Aug. 19, 1994), aff'd, 60 F.3d 816 (3d Cir. 1995). "[I]f the factual allegations of the

[3] It appears from Ms. Jacobs's state court deposition that this does not reflect some inadvertent oversight in pleading. She testifies to no injury from any conduct remotely characterized properly as negligent.

complaint sound in intentional tort, arbitrary use of the word 'negligence' will not trigger an insurer's duty to defend." Agora Syndicate, Inc. v. Levin, 977 F. Supp. 713, 715 (E.D. Pa. 1997). See also Potamkin, 961 F. Supp. at 111-112 (addition of negligence claim did not bring complaint within coverage when the factual allegations suggested intentional conduct) Germantown Ins. Co. v. Martin, 595 A.2d 1172, 1175 (Pa. Super. Ct. 1991) (denying coverage where complaint included negligence claim but conduct described was intentional). The factual allegations in the underlying complaint clearly describe intentional conduct and not mere negligence. See Gene's Restaurant, 548 A.2d at 247 (allegations of striking with fists describes intentional tort). See also Allstate Insurance Co. v. Fischer, 1998 WL 205693, at *3 (E.D. Pa. Apr. 28, 1998) ("A person cannot negligently grab another person and repeatedly strike his face."); Yaeger, 1994 WL 447405 (striking victim with broom handle is intentional and not negligent).

The loss of consortium claim also does not trigger plaintiff's duty to defend since this claim is derivative. See Fischer, 1998 WL 205693, at *3 (denying coverage for derivative loss of consortium claim).

Defendants argue alternatively that Ms. Tolmie's assertion she acted in self defense triggers the duties to defend and indemnify. While the Pennsylvania Supreme Court has not

squarely ruled on this question, the Superior Court has held that an assertion of self defense does not bring such an action within the coverage of a policy with an "expected or intended" exclusion. See Donegal Mut. Ins. Co. v. Ferrara, 552 A.2d 699, 702 (Pa. Super. 1989). This ruling appears to be sound and consistent with the rule that the duty to defend is determined by the factual allegations in the underlying complaint.

It clearly appears from the factual allegations in the underlying complaint that the injuries inflicted on Mrs. Jacobs resulted from intentional conduct by the insured and if not intended, which would be virtually inconceivable, were of a type substantially certain to result from the aggravated battery described. As such, there can be no coverage under the State Farm policy. State Farm thus has no duty to defend or indemnify Ms. Tolmie. Accordingly, plaintiffs motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of October, 1998, upon consideration of plaintiff's Motion for Summary Judgment (Doc. #8) and defendants' response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT** is **ENTERED** in the above declaratory judgment action for plaintiff and against defendants, and it is thus declared that plaintiff has no duty to defend or indemnify Mary Ellen Tolmie for the claims now asserted against her in the action entitled Thomas Jacobs and Ann Jacobs v. Mary Tolmie, pending in the Court of Common Pleas of Bucks County, Docket No. 94-07694-14-2.

BY THE COURT:

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JAY C. WALDMAN, J.